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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

*In re* KENSINGTON INTERNATIONAL LIMITED AND SPRINGFIELD ASSOCIATES, LLC,

Petitioners

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On Petition for a Writ of Mandamus to Judge Alfred M. Wolin,  
United States District Judge for the District of New Jersey, sitting by  
designation in the United States District Court for the District of Delaware

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**RESPONSE OF WATERS & KRAUS, L.L.P.,  
A RESPONDENT AFFECTED BY  
THE PETITION FOR MANDAMUS**

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TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Respondent, Waters & Kraus, L.L.P., on its own behalf, and as State Court counsel for approximately 1,750 asbestos victims with claims against Owens Corning and the Fibreboard Settlement Trust responds to the Petition of Kensington International Limited and Springfield Associates, L.L.C., Petitioners for a Writ of Mandamus to Judge Alfred M. Wolin, United States District Judge for the District of New Jersey, sitting by designation in the United States District for the District of Delaware, responding pursuant to the order of this Honorable Court issued October 30, 2003. Waters and Kraus oppose the Petition and would show by their response the following:

**I.**

1. Waters & Kraus is a Dallas-based law firm that principally represents plaintiffs afflicted by mesothelioma, other cancers caused by exposure to asbestos, and other serious asbestos

related disease.

## II.

2. Hard feelings make bad law. The extravagant Motion To Recuse Judge Alfred M. Wolin, the Emergency Petition for a Writ of Mandamus to this Honorable Court, its accompanying four hundred (400) page Appendix (hereinafter the “Appendix”), and one or more Supplements thereto are, in the words of the Bard “... much ado about nothing...”<sup>1</sup>. It is not that the moving parties, (“Petitioners”) lack sincerity. Any witness to the asbestos legal wars will credit Petitioners and their supporters with full fledged, heartfelt and continuing animosity toward asbestos plaintiffs, their counsel, and anyone else believed to be sympathetic to redress for asbestos related injury. Those who are not entirely committed to the defense (and derogation) of asbestos claims are consigned to the category of asbestos plaintiffs and fervently hated. But, no matter how deeply felt, animosity is not a basis to recuse a Federal Judge. The Petitioners make a pitifully weak case.

## III.

3. Let us first understand what the Petition for Mandamus does not allege. First, it does not implicate Judge Wolin's personal integrity or impartiality. No fact alleged suggests that Judge Wolin personally holds prejudice, bias or undue sympathy for or against any party to the complex matters in which he serves, or that he has any stake in the outcome. So much for actual partiality. That issue is not present.

## IV.

4. Nor is there alleged to be a prevailing pattern in Judge Wolin’s rulings, interlocutory or final, which bespeaks a pervasive partiality, perhaps unknown even to Judge Wolin. That issue is

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<sup>1</sup> William Shakespeare.

likewise not raised. On this point, the Petitioners' silence speaks volumes.

## V.

5. Nor do Petitioners argue that Judge Wolin lacked legal authority or a good reason to appoint five Advisors as he did by his Order of December 28, 2001. Certainly, the common substantive issues in the Five Asbestos Cases justified the additional judicial resources. No one complained when the Judge, on December 28, 2001, appointed five (5) persons as Court Appointed Advisors ("Advisors") and set them to certain designated tasks. And, to this date, Petitioners do not identify any party who has a rational complaint about any ruling, decision or order issued by the two "Conflicted Advisors", (as Petitioners derisively term them) David R. Gross and/or C. Judson Hamlin. Incidentally, the Petitioners do not complain formally of the appointment of or any activity by the other three judicially appointed Advisors.<sup>2</sup> Presumably, the professional activities undertaken since December 28, 2001, by the remaining three Advisors do not suggest personal attitudes which Petitioners and their cohorts judge to be unfriendly positions. Perhaps, they suggest the contrary.

## VI.

6. Petitioners do not allege that either Mr. Gross or Mr. Hamlin was in December, 2001, or is today professionally unsuited to perform the tasks assigned to them. Mr. Gross is described as having extensive experience in trial advocacy, including both Plaintiff and Defendant asbestos litigation, mass-tort, fraudulent transfer and insurance coverage litigation. He fully disclosed his role

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<sup>2</sup> The Order of December 28, 2001, appointed John E. Keefe, Esq., William A. Drier, Esq., and Professor Francis E. McGovern, in addition Messrs.. Gross and Hamlin.

in the Five Asbestos Cases when qualifying in the G-I Case. Judge Hamlin's qualifications are extensive, praiseworthy, and diverse. (please see Petitioner's Appendix, Pages 405-406).

## VII.

7. What, then, is this extraordinary proceeding all about? Stripped of extreme rhetoric, the Petitioners allege that in the course of fully disclosed professional activities in the G-I Case, undertaken subsequent to their appointment in the Five Asbestos Cases, Mr. Gross, as Counsel for Mr. Hamlin, the appointed and serving Legal Representative of Present and Future Holders of Asbestos Related Demands, has taken and argued legal positions adverse to certain claims the Petitioners have made or may make in the Five Asbestos Cases. And, they say, Judge Wolin meets with these individuals. They also point out that Mr. Gross in his role, as an advocate, has criticized the scientific methodology of Doctor Laticia Chambers, who is likely to testify for the Defendants in the Owens Corning Case, one of the Five Asbestos Cases. Thus, they argue, Judge Wolin is contaminated.

## VIII.

8. Based, seemingly, entirely on pleadings in the G-I Case, the Petitioners enthusiastically conclude that "...Judge Wolin and his Advisors have pre-judged the evidence and issues in this case..." (Please *See* the Emergency Petition for a Writ of Mandamus, Page 13.)

What evidence supports that conclusion? Must we assume that counsel for Kobe Bryant favors forceable rape? Or that Scott Peterson's lawyer approves of spousal murder? Mr. Gross and Judge

Hamlin are lawyers. When engaged as professionals, they represent the interest of their clients to the best of their professional ability. Whether those interests coincide with their individual views, or whether they hold individual views on the matters in which they fulfill professional responsibilities, is immaterial and beyond the purview of this proceeding. Nor does the authority cited by Petitioners dictate otherwise. In each of the two most significant cases, the *School Asbestos Litigation* and *Matter of Edgar* (full citations follow), it was the conduct of the Judge, not his advisors, that mandated recusal. The process of analysis is necessarily fact intensive, as, pursuant to 28 U.S.C. § 455, and the authorities thereunder, it must be.

## IX.

9. In the school case, *In re School Asbestos Litigation, Phizer, Inc., Petitioner v. The Honorable James McGirr Kelly, Respondent* 977 F.2d 764 (3<sup>rd</sup> Cir. 1992), Judge James M. Kelly had presided over bitter asbestos litigation for more than three (3) years prior to November 1986. At that time he was invited to attend a conference on asbestos related disease but was unable to do. Parties resisting asbestos litigation were frequent hosts of conferences reflecting their views. By 1989 the asbestos plaintiff parties in the *School Asbestos* case sought to hold a conference which would feature scientific views favorable to their clients. To facilitate the event they applied for and received (without notice to the Defendants) fifty thousand dollars (\$50,000) from a fund controlled by Judge Kelly. In 1990, Judge Kelly attended the meeting which had been underwritten by the fifty thousand dollars (\$50,000), then titled The Third Wave Conference. There he heard, or at least could have heard had he attended all speeches, fifty six (56) presentations from a lineup of experts

generally favorable to asbestos plaintiffs.

10. In July, 1990 the Plaintiffs in the *School Asbestos* case filed a list of eighteen (18) expected experts, thirteen (13) of whom had spoken at The Third Wave Conference. The Defendants learned of the conference event and began to utilize formal discovery to flesh out the facts. Discovery was resisted, but the facts finally emerged. Upon challenge, and upon a resume of the facts, The Third Circuit held a reasonable person might question Judge Kelly's ability to remain impartial:

"We are convinced that a reasonable person might question Judge Kelly's ability to remain impartial. To put it succinctly, he attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that he himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, he was, in his own words, exposed to a Hollywood-style "pre-screening" of the plaintiff's case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial. We need not decide whether any of these facts alone would have required disqualification, for, as we shall explain, we believe that together they create an appearance of partiality that mandates disqualification." (Pages 781-782).

11. In the *School Asbestos* Case, every single act complained of by the asbestos defendants was the act of Judge Kelly himself. In this case, the alleged bad acts were not committed by Judge Alfred Wolin.

## X.

12. The interaction of the presiding judge with an appointed panel of experts was present in *Matter of James R. Edgar*, 93 F.3d 256 (7<sup>th</sup> Cir. 1996). There, the similarity stops. The panel of

experts with the whom the Judge interacted had been appointed to investigate the State of Illinois' healthcare institutions and programs. The panel was empowered to meet with patients and state employees, but they had no reason to meet in private with the Judge. However, they did so, extensively. When the defendants in the case sought to learn more about the Judge's meetings with the panel of experts, the Judge forbade inquiry. He quashed subpoenas, and invoked what he called a "judicial privilege" to shield what had been said. The Judge went further. He consistently expressed his personal views that the panel of experts' forthcoming report would be correct and should be believed. His conduct toward all parties, including the Governor of Illinois, was erratic and threatening. He left no doubt of his personal partiality, and his disqualification was fully warranted. No other result was defensible under the facts.

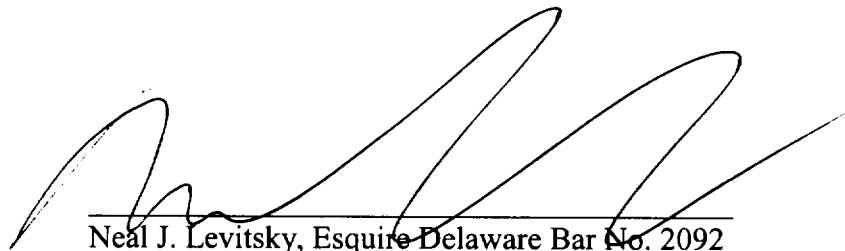
## **XI.**

13. Judge Alfred E. Wolin has done none of the above. No meetings with witnesses, no intemperate behavior, no secrecy, no reluctance to disclose all the facts, no demonstrated partiality. Two lawyers, of the five he appointed as Advisors, both of whom were fully qualified, undertook new professional engagements after their appointments in the Five Asbestos Cases on the side of certain asbestos plaintiffs. So what? Judge Wolin is entitled to request and receive a diversity of views. The fact that the Petition may disagree with some of those views or detest the lawyers who advocate them does not justify an extravagant and extraordinary Motion or Petition for Writ of Mandamus.

**WHEREFORE**, Waters & Kraus, an affected respondent, prays that its Response in opposition to Petitioners Petition for Writ of Mandamus be considered, and that upon final hearing, such Writ of Mandamus be dismissed and in all things denied, and Waters & Kraus further pray for such other and all further relief as may be just and proper.

Respectfully submitted,

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A large, stylized handwritten signature in black ink, likely belonging to Neal J. Levitsky, is written over a horizontal line.

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Attorneys for the Waters & Kraus Claimants

Dated: November 10, 2003



No. 03-4212

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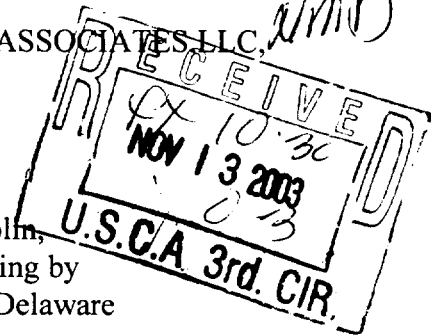
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**CERTIFICATE OF SERVICE**

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I, Neal J. Levitsky, Esquire, of Fox Rothschild LLP hereby certify that on this 12<sup>th</sup> day of November, 2003 served a copy of the Response of Waters & Kraus L.L.P., a Respondent Affected by the Petition for Mandamus by First-Class Mail, postage prepaid on the parties on the attached service list.

By: 

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